



MARINE MAMMAL COMMISSION

13 March 2019

Ms. Jolie Harrison, Chief
Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Dear Ms. Harrison:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the application submitted by the City and Borough of Juneau (CBJ) seeking authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act (the MMPA) to take small numbers of marine mammals by harassment. The taking would be incidental to conducting a waterfront improvement project in Juneau, Alaska. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 5 March 2019 notice (84 Fed. Reg. 7880) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

CBJ plans to remove and install piles during improvement of the waterfront area to accommodate the needs of the cruise ship industry. Operators would (1) remove 100 14-in timber piles using a vibratory hammer, (2) install 87 16- to 18-in steel pipe piles using a vibratory and/or impact hammer, and (3) install and remove 87 18-in temporary steel pipe piles using a vibratory hammer. CBS's activities could occur on up to 82 days, weather permitting. It would limit pile-driving and -removal activities to daylight hours.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A¹ and B harassment of small numbers of harbor seals. NMFS anticipates that any impact on the affected species and stocks would be negligible. NMFS also does not anticipate any take of marine mammals by death or serious injury and believes that the potential for disturbance will be at the least practicable level because of the proposed mitigation measures. The mitigation, monitoring, and reporting measures include—

¹ The Commission informally noted that NMFS should authorize Level A harassment takes for harbor seals during impact pile driving based on the size of the Level A harassment zone and the fact that a small number of resident harbor seals occur regularly near the cruise ship berths. The Commission suggested that up to 4 harbor seals could be taken on each day that impact pile driving could occur, resulting in up to 72 Level A harassment takes. NMFS agreed and indicated that the Level A harassment takes would be included in the final authorization accordingly.

- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment²;
- using two qualified protected species observers to monitor the Level A and B harassment³ zones for 30 minutes before, during, and for 30 minutes after the proposed activities;
- using soft-start, delay, and shut-down procedures;
- using delay and shut-down procedures, if a species for which authorization has not been granted or if a species for which authorization has been granted but the authorized takes are met, approaches or is observed within the Level A and/or B harassment zone;
- reporting injured and dead marine mammals to the Office of Protected Resources and the Alaska Regional Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final report.

The Commission concurs with NMFS's preliminary finding and recommends that NMFS issue the incidental harassment authorization, subject to the inclusion of the proposed mitigation, monitoring, and reporting measures.

Proposed one-year authorization renewals

NMFS has indicated that it may issue a second one-year⁴ incidental harassment authorization renewal for this and other future authorizations if various criteria are met (see 83 Fed. Reg. 42489 for details). The Commission agrees that NMFS should take appropriate steps to streamline the authorization process under section 101(a)(5)(D) of the MMPA to the extent possible. However, the Commission is concerned that the renewal process proposed in the *Federal Register* notice is inconsistent with the statutory requirements. Section 101(a)(5)(D) clearly states that proposed authorizations are subject to publication in the *Federal Register* and elsewhere and that there be a presumably concurrent opportunity for public review and comment. NMFS's proposed renewal process would bypass the public notice and comment requirements when it is considering the renewal.

The Commission further notes that NMFS implemented an abbreviated authorization process by publishing the required information⁵ via an abbreviated *Federal Register* notice, referencing the relevant documents, and providing a 30-day public comment period. The abbreviated process preserves the full opportunity for public review and comment for the MMPA's required 30-day

² The Commission informally noted that NMFS omitted this standard measure from the *Federal Register* notice and proposed incidental harassment authorization. NMFS indicated that the measure would be included in the final authorization.

³ The Commission informally noted that NMFS used an inappropriate source level for vibratory driving of 16- and 18-in piles, which was based on vibratory removal rather than driving. Previous acoustic monitoring data from Naval Base Kitsap indicated that the source level for vibratory pile driving is greater than what had been proposed, suggesting that 161 rather than 153.9 dB re 1 μ Pa is more appropriate for estimating the extents of the Level A and B harassment zones. NMFS confirmed it would use 161 dB re 1 μ Pa as the source level for vibratory pile driving and would revise the Level A and B harassment zones accordingly in the final authorization.

⁴ NMFS informed the Commission that the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. NMFS has yet to specify this in any *Federal Register* notice detailing the new proposed renewal process but should do so.

⁵ Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

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period, does not appear to be unduly burdensome on either the applicant or NMFS, and is much preferred over NMFS's proposed renewal process⁶. Thus, the Commission recommends that NMFS refrain from implementing its proposed renewal process and instead use abbreviated *Federal Register* notices, reference existing documents to streamline the incidental harassment authorization process, and provide a 30-day period for the public to comment. If NMFS adopts the proposed renewal process notwithstanding the Commission's recommendation, the Commission further recommends that NMFS provide the Commission and the public with a legal analysis supporting its conclusion that the process is consistent with the requirements under section 101(a)(5)(D) of the MMPA.

The Commission hopes you find its letter useful. Please contact me if you have questions regarding the Commission's recommendations.

Sincerely,



Peter O. Thomas, Ph.D.,
Executive Director

⁶ See the Commission's [30 April 2018 letter](#) detailing this matter.